

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
MABEL DYSON BURKE,

Appellant,

-against-

SUPREME COURT, CRIMINAL COURT, CIVIL
COURT, SOCIAL SECURITY ADMINISTRATION,
DEPARTMENT OF CORRECTIONAL SERVICES,
POLICE DEPARTMENT, DISTRICT ATTORNEY'S
OFFICE, HOUSING DEVELOPMENT ADMINI-
STRATION, ATTORNEY GENERAL'S OFFICE,
MAURICE NADJARI, PAUL J. PEGAN,
JOHN J. WALSH, JAWN SANDIFER, JAMES
MORRIS, MURRAY J. DIAMOND, MICHAEL
COOD, MICHAEL GOLDSCHMID, DAVID LEWIS,
RICHARD KUH, FARDELL RASHFORD, SHYLEUR
BARRACH, EDWARD THOMPSON, JAMES
CARDWELL, JOSEPH J. KELLY, WALLACE
RICE, WILLIAM CASHEL, SANDRA PAGE,
MARVIN PENSTEIN,

Appellees.
-----X

75-6141

75-6141



BRIEF FOR APPELLEES, ATTORNEY
FOR THE SUPREME COURT, CRIMINAL
COURT, CIVIL COURT, DEPARTMENT
OF CORRECTIONAL SERVICES,
ATTORNEY GENERAL'S OFFICE,
MAURICE NADJARI, PAUL J. PEGAN,
JAWN SANDIFER, EDWARD THOMPSON,
WILLIAM CASHEL AS APPELLEES.

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Appellant, :

-against- : 75-6141

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COURT, SOCIAL SECURITY ADMINISTRATION, :
DEPARTMENT OF CORRECTIONAL SERVICES, :
POLICE DEPARTMENT, DISTRICT ATTORNEY'S :
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MARVIN PENSTEIN, :

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BRIEF FOR APPELLEES, ATTORNEY
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JAWN SANDIFER, EDWARD THOMPSON,
WILLIAM CASHEL AS APPELLEES.

Statement

This is an appeal from an order of the United States
District Court for the Southern District of New York dated
November 17, 1975 (Connor, J.), granting defendants' motion

to dismiss a complaint brought pursuant to 42 U.S.C. §§ 1983 and 1985 inter alia for failure of plaintiff to present a substantial federal question.

Questions Presented

1. Whether the plaintiff has standing to sue upon behalf of her adult son?
2. Whether the complaint has failed to allege the deprivation of a constitutional or federal right?
3. Whether the defendants are all immune from suit by virtue of the doctrines of either judicial or prosecutorial immunity?
4. Whether the complaint fails to allege any specific cause of action against the defendants?
5. Whether the appellees which constitute mere branches of the State government are "persons" under 42 U.S.C. §§ 1983 and 1985?

Facts

The appellant appears to contend that there is a conspiracy to destroy her and her son's confidence in democratic procedures; (2) to subject her to such stress and anxiety that she will die before obtaining an adjudication of a Workmen's Compensation claim which the appellant states

is presently pending; and (3) to murder her son, who has already been confined, allegedly without cause, in a mental institution.

The purported conspirators include the appellants' landlord, who allegedly has failed to provide adequate maintenance of her apartment and has sought unlawfully to evict Mrs. Burke on several occasions; Sandra Page, a 19 year old girl who is claimed to have assaulted the appellant at the insistence of her landlord; judges, attorneys, state and federal administrative agencies, their supervisors and some of their other personnel, who are charged with either mishandling the appellant's son's legal problems or ignoring the appellant's pleas for protection or assistance in her battles with Sandra Page, her landlord, the Social Security Administration and the Workmen's Compensation Board.

Proceedings in Federal District Court

The appellant brought suit in the United States District Court for Southern District of New York by a complaint dated October 25, 1974. The complaint did not specify under what statutory authorization was the action proceeding. However, fairly construed the complaint sounds in 42 U.S.C. §§ 1983 and 1985, and was treated as such by the district court. The appellant claimed the appellees either obstructed justice, committed perjury, failed to enforce the law, or violated the procedures of the courts, the government and public offices.

The appellees moved to dismiss the complaint pursuant to Federal Rule of Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The district Court, Connor, J., granted defendants' motion to dismiss and held inter alia that the appellant had no standing to sue on behalf of her son; that complaint failed to allege deprivation of any federal right; that the defendants are immune from suit; that there is no allegation of any specific cause of action against the defendants, and that certain defendants did not constitute persons within the meaning of 42 U.S.C. §§ 1983 and 1985.

POINT I

THE APPELLANT LACKS
STANDING TO SUE ON
BEHALF OF HER ADULT
SON.

The plaintiff lacks standing to assert a civil rights claim on behalf of her son as an unnamed plaintiff to this action. One cannot sue for the deprivation of another's civil rights. National Organization for Women - New York Chapter v. Goodman, 374 F. Supp. 247 (S.D.N.Y. 1974); Aguayo v. Richardson, 473 F. 2d 1090, 1099-1100 (2d Cir. 1973) cert. denied 414 U.S. 1146 (1974). Inasmuch as the plaintiff seeks to maintain a cause of action for the deprivation of the rights,

privileges, or immunities of her son, the plaintiff does not state an actionable claim under 42 U.S.C. §§ 1983 or 1985.

POINT II

THE APPELLANT HERE FAILED
TO ALLEGE DEPRIVATION OF
ANY CONSTITUTIONAL OR
FEDERAL RIGHT.

In order to maintain a civil rights action, plaintiff must allege the performance of acts which deprived him of rights secured to him by the United States Constitution or federal law. Monroe v. Pape, 365 U.S. 167 (1961); Johnston v. National Broadcasting Co., Inc., 356 F. Supp. 904 (E.D.N.Y. 1974); 900 G.C. Appleates, Inc. v. City of New York, 367 F. Supp. 1 (S.D.N.Y. 1973). The complaint fails to allege any circumstances indicating that the defendants deprived the plaintiff of any federal right.

The complaint alleges that the defendants conspired to inflict upon the plaintiff various physical and mental injuries as a result of their alleged malfeasance and nonfeasance to perform their individual duty to assist her by either not enforcing the laws, obstructing justice, or failing to prosecute. The complaint states no cause of action under the Civil Rights Law relating to a conspiracy to deprive the plaintiff of her federal rights, since the plaintiff failed

to allege any facts that would tend to support her conclusory allegations as to the existence of a conspiracy, or that the violations of her rights were the result of a vindictive and intentional act on the part of defendants to deprive her of equal protection of the laws or equal privileges and immunities. See Jennings v. Davis, 476 F. 2d 1271, 1274-75 (7th Cir. 1973); Adams v. Pate, 445 F. 2d 105, 108-09 (7th Cir. 1971); Hopkins v. Hall, 372 F. Supp. 182, 183 (E.D. Okla. 1974); Furomoto v. Lyman, 352 F. Supp. 1267, 1274-75 N.D. Calif. 1973). Johnston v. National Broadcasting Co., Inc. 356 F. Supp. 904 (E.D.N.Y. 1973) and Sams v. New York State Bd. of Parole, 352 F. Supp. 296 (S.D.N.Y. 1972).

POINT III

THE APPELLEES ARE ALL
IMMUNE FROM CIVIL SUIT.

Defendants Sandifer, Walsh, and Thompson are being sued in their official capacities as Judges of the Supreme Court, Criminal, and Civil Court. The doctrine of judicial immunity prevents the recovery of damages against a judge on account of action taken in the exercise of his judicial responsibilities. The Supreme Court has declared that "Judges, like executive officers with discretionary functions, have been held absolutely immune regardless of their motive or bad faith."

Doe v. McMillan, 412 U.S. 306, 319 (1973); Pierson v. Ray, 386 U.S. 547 (1966); Cf. Dombrowski v. Eastland, 387 U.S. 82 (1967); Whelden v. Wheeler, 373 U.S. 647 (1963); Tennev v. Brandhove, 341 U.S. 367 (1951).

The federal judiciary has never hesitated to apply the doctrine of judicial immunity in actions brought against a judge. See Doe v. McMillan, 412 U.S. 306, 309 (1973); Pierson v. Ray, 386 U.S. 547, 553-554 (1967); E.M. Blouin Dembitz, 489 F. 2d 488 (2d Cir. 1973); Fanale v. Sheehy, 385 F. 2d 866 (2d Cir. 1967); Edwards v. New York, 314 F. Supp. 469 (S.D.N.Y. 1970); Law Student Civil Rights Research Council, Inc., v. Wadmond, 299 F. Supp. 117 (S.D.N.Y. 1969) affd. 401 U.S. 154 (1971); Stambler v. Dillon, 302 F. Supp. 1250 (S.D.N.Y. 1969); Morgan v. Sylvester, 125 F. Supp. 380 (S.D.N.Y. 1954) affd. 220 F. 2d 758 (2d Cir. 1955), cert. denied 350 U.S. 867 reh. denied 350 U.S. 919.

Accordingly, this complaint should be dismissed against all judges who are party defendants on the ground that the acts complained of were performed by the defendants in their judicial capacity, and hence they are absolutely immune from suit.

The complaint should also be dismissed as to defendants Nadjari and the Attorney General's office on the grounds of prosecutorial immunity. Immunity of judges from civil rights suit for acts committed within their judicial discretion may also shield related public servants, and a public prosecutor is a quasi-judicial officer and enjoys official immunity unless he acts outside the scope of his jurisdiction and without authorization of law. Scholnick v. Winston, 219 F. Supp. 836, 840 (S.D.N.Y. 1963) sub nom. Scolnick v. Lefkowitz, 329 F. 2d 716 (2d Cir. 1964). Cf. Dacey v. New York County Lawyers' Association, 423 F. 2d 188 (2d Cir. 1969), cert. denied 398 U.S. 929; Fanale v. Sheehy, 385 F. 2d 866 (2d Cir. 1967); Pugh v. Klinger, 340 F. Supp. 471 (S.D.N.Y. 1971); Palermo v. Rockefeller, 323 F. Supp. 478 (S.D.N.Y. 1971). Cf. Rego Trading Corp. v. Birnes, 361 F. Supp. 1341 (S.D.N.Y. 1973) and Fowler v. Vincent, 366 F. Supp. 1224 (S.D.N.Y. 1973).

Since the complaint is seeking damages against the defendants Nadjari and the Attorney General's office for allegedly illegal conduct and nothing in the complaint indicated that defendants were not acting in discharge of their official duties, plaintiff is not entitled to recover damages against such defendants.

Note, too, that defendants Cashel and Thompson as executive officials are similarly immune from suit. Barr v. Matrio, 360 U.S. 564 (1959); Scolnick v. Lefkowitz, 329 F. 2d 716 (2d Cir. 1964), cert. denied. 379 U.S. 725 (1944). See also Scheuer v. Rhodes, 416 U.S. 232 (1974).

POINT IV

THE APPELLANT FAILS TO
ALLEGE ANY SPECIFIC CAUSE
OF ACTION AGAINST THE
APPELLEES.

The names of defendants Nadjari, Regan, Walsh, Sandifer, Thompson, Cashel and the Attorney General's office are mentioned in the complaint without any allegation of personal involvement of anyone of them to cause the specific injuries incurred by the plaintiff.

The personal involvement of one purportedly denying federal rights is an essential element of a civil rights claim against him. Specific facts and overt acts establishing that involvement in the effectuation of the injuries incurred by the plaintiff must be alleged to make out a cause of action, and mere conclusions without supporting facts are insufficient to raise civil rights claims. Powell v. Jarvis. 470 F. 2d 551

(2d Cir. 1972); Powell v. Workmen's Compensation Board, 327 F. 2d 131 (2d Cir. 1964); Sams v. New York State Board of Parole, 352 F. Supp. 296 (S.D.N.Y. 1972); See also Gillbeau v. City of Richmond, 417 F. 2d 426, 428-30 (9th Cir. 1969); Jemzura v. Belden, 281 F. Supp. 200, 206-207 (S.D.N.Y. 1968); Franklin v. Zuber, 56 F.R.D. 601, 602 (S.D.N.Y. 1972); Gregoire v. Biddle, 177 F. 2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).

With respect to Mr. Regan who is sued as Chairman of the Board of Parole, and Mr. William Cashel, Area Director, of the Board of Parole, it should be also noted that the complaint fails to allege that plaintiff's rights were violated by any actions personally taken by them against the plaintiff, or by any failure on their part to fulfill any definable duty owed by them to the plaintiff. The complaint alleges failure of their staff to perform certain duties, and they, by being in charge of their staff should be held responsible for their inactivity on behalf of the plaintiff. "The rule in this circuit is that when monetary damages are sought under 42 U.S.C. § 1983 the general doctrine of respondeat superior does not suffice and showing of some personal responsibility of the defendant is required." Johnson v. Glick, 481 F. 2d

1028, 1034 (2d Cir. 1974); Schumate v. People of the State of New York, 373 F. Supp. 1165 (S.D.N.Y. 1974); Mukmuk v. Commissioner of Dept. of Correctional Services, 369 F. Supp. 245 (S.D.N.Y. 1974). See also Sostre v. McGinnis, 442 F. 2d 178, 205 (2d Cir. 1971), cert. denied, 404 U.S. 1049, cert. denied, 405 U.S. 978 (1972); Lathan v. Oswald, 359 F. Supp. 85 (S.D.N.Y. 1973).

Thus, the defendants Regan and Cashel may not be held liable to the plaintiff on the grounds of respondeat superior.

POINT V

THE APPELLEES, THE SUPREME COURT, THE CRIMINAL COURT, THE CIVIL COURT AND THE OFFICE OF THE ATTORNEY GENERAL ARE NOT "PERSONS" AMENABLE FOR SUIT UNDER EITHER 42 U.S.C. §§ 1983 OR 1985.

The Supreme Court, the Criminal Court, the Civil Court, and the Office of the Attorney General are not persons, but rather branches of the State government. As such, they do not constitute "persons" under 42 U.S.C. §§ 1983 and 1985 and thus are not amenable to suit under a civil rights law claim. Egan v. City of Aurora, 365 U.S. 514 (1961); Monroe v. Pape, 365 U.S. 167 (1961); Sykes v. State of California, 297 F. 2d 197, 201 (9th Cir. 1974); United States ex rel. Gittlemacher, v. County of Philadelphia, 413 F. 2d 84 (3d Cir. 1969), cert.

denied, 396 U.S. 1046 (1970). Sams v. New York State Bd.
of Parole, supra; La Rouge v. City of New York, 369 F. Supp.
565 (S.D.N.Y. 1974).

CONCLUSION

THE COMPLAINT SHOULD BE DISMISSED
IN ALL RESPECTS.

Dated: New York, New York
February 27, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for the Supreme Court,
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Edward Thompson, William
Cashel, as Defendants

SAMUEL HIRSHOWITZ
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of Counsel

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

NORBERTA MONTALVO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for State Appellees herein. On the 4th day of March , 1976 , she served the annexed upon the following named person :

MS. MABEL DYSON BURKE
226 West 122nd Street
New York, NY 10027

Pro
Attorney/ in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney/ at the address within the State designated by her for that purpose.

Norberta Montalvo

Sworn to before me this
4th day of March , 1976

Walter L. Sutherland
Deputy Assistant Attorney General
of the State of New York